OPINION OF THE CORPORATION COUNSEL

TO: **Anthony A. Williams**
Mayor

John A. Koskinen
City Administrator

Kelvin J. Robinson
Chief of Staff

Herbert R. Tillery
Deputy Mayor for Operations

FROM: **Arabella W. Teal**
Interim Corporation Counsel

DATE: **May 30, 2003**

SUBJECT: **Whether Charles Maddox May Continue to Serve as Inspector General After June 1, 2003 (AL-03-193(D); MID 93026)**

This is in response to your request for an opinion with respect to whether the incumbent officeholder of the Office of the Inspector General, Charles Maddox, may continue to serve as Inspector General after June 1, 2003. This question arises because the Council of the District of Columbia has enacted emergency and temporary bills that impose new qualification requirements for the position of Inspector General that apply as of June 1, 2003. We understand that Mr. Maddox is not able to meet these new requirements by June 1, 2003. The acts provide that, if the incumbent does not meet the new requirements on June 1, 2003, he "shall not continue to hold the position and the position shall be vacant." *See* § 2(d) of the Inspector General Qualifications Emergency Amendment Act of 2003, effective April 29, 2003, D.C. Act 15-78.

SUMMARY

Title IV of the District of Columbia Home Rule Act ("Home Rule Act"), approved December 24, 1973, Pub. L. 93-198, D.C. Official Code § 1-204.01 *et seq.* (2001), creates the familiar tripartite structure of government for the District, and it is well established that the power to remove an officer who performs executive functions is an executive, not a legislative, power. Based on

court precedents that address the executive power of removal in other but similar contexts, I conclude that the courts would very probably rule that § 2(d) of the emergency act violates separation of powers principles by imposing new qualification requirements on the incumbent officeholder that, if applied on June 1, 2003, would result in his removal.[1] Accordingly, I conclude that the new subparagraph 208(a)(1)(D-i)(ii) of the IG Act, as added by § 2(d) of the emergency act, is null and of no effect, and that Mr. Maddox may lawfully continue to hold the position of Inspector General after June 1, 2003, pursuant to the terms of his appointment.

BACKGROUND

The Council passed an emergency version of the bill, Bill 15-200, the "Inspector General Qualifications Emergency Amendment Act of 2003" (the "emergency act"), on March 18, 2003. The Mayor vetoed this bill on April 2, 2003, and the Council overrode the veto on April 29, 2003. This bill, now D.C. Act 15-78, became effective on April 29, 2003, and will remain in effect for 90 days. A temporary version of the bill, Bill 15-201, the "Inspector General Qualifications Temporary Act of 2003", was passed by the Council on April 1, 2003. The Mayor vetoed this bill on April 16, 2003, and the Council overrode the veto on April 29, 2003. This bill, now D.C. Act 15-79, is projected to become effective on June 20, 2003, according to the Council's Legislative Services Division. The Council passed the permanent bill, Bill 15-183, the "Inspector General Qualifications Amendment Act of 2003", on May 6, 2003, and the Mayor vetoed this bill on May 16, 2003. The Council has not yet voted to override this veto.

The emergency act, the only one of the three bills currently in effect, amends § 208 of the District of Columbia Procurement Practices Act of 1985 ("IG Act"), effective February 21, 1986, D.C. Law 6-85, D.C. Official Code § 2-302.08 (2001), which establishes the Office of the Inspector General ("IG") and describes the IG's duties. The emergency act's most immediate effect is to establish and apply new minimum qualifications for the position of IG as of June 1, 2003. The emergency act requires the IG, as of June 1, 2003, to:

- Be a graduate of an accredited law school, be a member in good standing of the D.C. Bar for at least seven years immediately preceding appointment, and have at least seven years experience in the practice of law; or

- Be licensed as a certified public accountant ("CPA") in the District for at least seven years immediately preceding appointment and have at least seven years aggregate experience in the practice of accounting, tax consulting, or financial consulting; or

- Hold a CPA certificate from the D.C. Board of Accountancy, be a member of the Greater Washington Society of Certified Public Accountants, and have at least seven years experience in the practice of public accounting.

The emergency act applies these three alternative new standards as of June 1, 2003, so that if the current IG, Charles Maddox, fails to meet them as of that date he "shall not continue to hold the position [of IG] and the position shall be vacant."[2] *See* § 2(d) of the emergency act.

[1] This conclusion is based on the assumption that it is impossible for Mr. Maddox to meet the new qualification requirements by June 1, 2003.

(footnote cont'd)

Before it was most recently amended by the emergency act, the IG Act provided that the IG serves a six-year term and must be confirmed by the Council during a non-control year. The emergency act preserves the six-year term and the Council confirmation requirement. However, the emergency act adds that, if the position of IG becomes vacant for any reason other than expiration of an IG's term, the Mayor shall submit a nomination to the Council, for confirmation, within 30 days after the vacancy occurs. Under the emergency act, the person so confirmed would serve only for the remainder of the unexpired term. Also, no person could serve on an acting basis as IG, either after a completed term or during an unexpired term, unless the person meets the standards bulleted above. Thus, if Mr. Maddox fails to meet the new qualification standards, the Mayor could not appoint him to fill the unexpired term on an acting basis, pending confirmation of a successor.

Finally, the emergency act prohibits an IG from serving in a hold-over capacity, without confirmation, after expiration of the IG's term. This means that, were Mr. Maddox rendered ineligible under the new minimum qualification requirements, as well as ineligible for appointment to his unexpired term on an acting basis, he would also be unable to holdover in the position, in his own right, pending confirmation of a successor.

ANALYSIS

Title IV of the Home Rule Act, D.C. Official Code § 1-204.01 *et seq.*, creates the familiar tripartite structure of government for the District of Columbia, including a legislative, executive and judicial branch of government. *See Wilson v. Kelly*, 615 A.2d 229, 231 (D.C. 1992). As such, the courts would apply the same general separation of powers principles to the District government as are applied to the federal government. *Id.*

It is well established that the power to remove an officer who performs executive functions is an executive, not a legislative, power. *See Myers v. United States*, 272 U.S. 52 (1926). Accordingly, the United States Supreme Court has struck down laws in which Congress attempted to involve itself in the removal of executive officials. *Bowsher v. Synar*, 478 U.S. 714 (1986)(the Comptroller General, as an officer removable by Congress, may not exercise the executive powers conferred upon him by statute); *Myers, supra* (the President had power to remove a postmaster of the first class, without the advice and consent of the Senate as required by act of Congress). As explained in *Morrison v. Olson*, 487 U.S. 654, 689-690 (1988):

> [t]he analysis contained in our removal cases is designed * * * to ensure that Congress does not interfere with the President's exercise of the "executive power" and his constitutionally appointed duty to "take care that the laws be faithfully executed" under Article II.

The question is whether the Council is intruding upon the Mayor's executive function of removal by imposing new qualification requirements on the incumbent before the end of his term, on the

---

(footnote cont'd)

[2] The emergency act also requires that the IG be appointed with: (1) a minimum of seven years of supervisory and management experience, plus (2) a minimum of seven years of demonstrated experience and ability, in the aggregate, in law, accounting, auditing, financial management analysis, public administration, or investigations. However, these two additional requirements do not apply to the incumbent as of June 1, 2003.

assumption that such imposition will result in his removal from office.[3] The courts have scrutinized the legislature's attempt to change an already-existing office in some way that results in the removal of the incumbent from that office to determine whether the legislature is exercising its legitimate legislative powers or whether it is circumventing the executive's power to remove.

For example, in *Ahearn v. Bailey*, 451 P.2d 30 (Ariz. 1969), the plaintiff was appointed to a three-member commission for a six-year term. About two years into the six-year term, the legislature shortened the term to three years and increased the number of members to five. The Governor reappointed two of the three original members and appointed three new members to the newly constituted commission. The one original member who was not reappointed by the Governor challenged the shortening of his term by the legislature as a violation of the separation of powers, and the Arizona Supreme Court agreed.

The court quoted from an early removal case decided by the United States Supreme Court that is often cited:

> [t]he fundamental necessity of maintaining each of the three general departments of government entirely free from the control or coercive influence, direct or indirect, of either of the others, has often been stressed and is hardly open to serious question. So much is implied in the very fact of the separation of the powers of these departments by the Constitution; and in the rule which recognizes their essential coequality.

Id. at 32 (quoting *Humphrey's Executor v. United States*, 295 U.S. 602, 629 (1935)).

In striking down the attempt to shorten the term, the *Ahearn* court held that the Governor is charged with the duty of taking care that the laws are faithfully executed, and that the power to remove is an executive function. The court noted that, while the legislature may prescribe the grounds or causes for removal, it may not "directly undertake to remove a public officer except as granted under the constitutional power of impeachment."*Id.* at 33. The court rejected the argument that legislature's power to abolish offices may be exercised at will. It ruled that this power may not be used as "a device to unseat the incumbent, thereby encroaching upon the authority of the executive."[4] *Id.* at 34.

---

[3] Section 422 of the Home Rule Act, D.C. Official Code § 1-204.22, vests the executive power of the District in the Mayor, and provides that "the Mayor shall be responsible for the proper execution of all laws relating to the District, and for the proper administration of the affairs of the District coming under his jurisdiction or control". In addition, § 422(2) provides that "[t]he Mayor shall administer all laws relating to the appointment, promotion, discipline, separation, and other conditions of employment of personnel in the * * * executive departments of the District…" Consistent with this executive power, the authority to remove the Inspector General, who is an official of the executive branch, is specifically vested in the Mayor by § 208(a)(1)(A) of the IG Act.

[4] The court stated that the legislature can use its power to create or abolish an office when it serves legitimate reasons of economy or reorganization, such as when the legislature: (1) abolishes an office and no substitute is created; (2) abolishes two or more offices with substantially the same duties or different duties and combines the duties under one office for reasons of economy or genuine reorganization; or (3) abolishes an office and creates a new office that has substantially new, different or additional functions, duties or powers so that it is an office different from the one abolished, even though it also includes the duties of the abolished office. *Id.* at 35. In other words, the legislature must be exercising its legitimate legislative powers, and not encroaching on the executive power of removal.

In addition, in *Kelley v. Clark*, 193 A. 634 (Pa. 1937), a state statute provided that the Civil Service Commission of the City of Philadelphia would consist of three Commissioners elected by the City Council for a four-year term. The state legislature subsequently enacted a statute that abolished this Commission and established a new Commission that would be composed of two members appointed by the Mayor, two members appointed by the City Controller, and one member elected by these four members. It also provided that the act would become effective immediately. The Pennsylvania Supreme Court ruled:

> [t]he acts considered together, as they must be, make it plain that the intention was to oust the commissioners elected by the city council and put in their places commissioners appointed by the mayor, the controller and their appointees. There was no intention to abolish the office; language in the [act] that it is abolished is mere subterfuge. The intention to the contrary is too obvious.

Id. at 636. While the court acknowledged that an office exists by the will of the legislature and may be abolished at any time,

> [i]t does not follow, however, that the legislature can, by direct or indirect means, continue the office and remove an incumbent whom it has not appointed. And it may not, for such purpose, change the appointing power, thereby shifting the power of removal.

Id. at 637.

See also State ex rel. Hammond v. Maxfield, 132 P.2d 660 (Ut. 1943)(legislature may not indirectly circumvent the governor's power to remove).

If the courts will scrutinize legislation that shortens the term of an incumbent's office, or abolishes an office, to determine whether the legislature's true intent is to oust the incumbent of an office, the courts will likely consider whether the Council's change in qualifications is really intended to remove the incumbent before the end of his term. As part of this inquiry, it must be determined whether Mr. Maddox is able to meet the more stringent qualification requirements as of June 1, 2003.[5] Assuming he is unable to do so, I believe that a court would very probably rule that the application of the new requirements to Mr. Maddox during his term violates separation of powers principles by requiring his removal from office.

The emergency act creates three alternative qualification standards, including being: (1) a graduate of an accredited law school and a member in good standing of the bar of the District of Columbia for at least seven years immediately preceding his or her appointment and seven years experience in the practice of law; (2) licensed as a certified public accountant in the District of Columbia for at least seven years immediately preceding his or her appointment and seven years experience, in the aggregate, in the practice of accounting, tax consulting, or financial consulting; or (3) a holder of a certified public accountant certificate from the District of Columbia Board of Accountancy and a member of the Greater Washington Society of Certified Public Accountants, and seven years experience in the practice of public accounting. *See* § 2(d) of the emergency act.

[5] We understand, and assume for the purposes of this opinion, that Mr. Maddox is unable to meet these new requirements by June 1, 2003. Mr. Maddox states in a letter to Vincent B. Orange, Sr., Chairperson, Committee on Government Operations, dated March 24, 2003, that the bill "would force me to vacate my Office on June 1, 2003."

The record amply supports the view that Mr. Maddox cannot meet the first alternative qualification, and that the Council knows this fact. In Resolution 14-366, the Sense of the Council Vote of No-Confidence in Inspector General Charles C. Maddox Emergency Resolution of 2002 (February 5, 2002), the Council stated as grounds for no-confidence that Mr. Maddox graduated from a law school that was not accredited by the American Bar Association or the State of Virginia and that Mr. Maddox was not a member of the District of Columbia Bar at the time of his appointment as General Counsel to the Office of the Inspector General on April 13, 1998. They further noted that, under D.C. Bar admission rules, it would have been impossible for Mr. Maddox to become a member of the D.C. Bar by April 13, 1999, as required by law, thereby making it impossible for Mr. Maddox to meet the requirement that the Inspector General be a member of the D.C. Bar for at least seven years immediately preceding appointment.[6]

The resume submitted in support of his appointment in May 1999 does not reflect that Mr. Maddox was licensed as a certified public accountant under Chapter I-B of Title 47 of the District of Columbia Official Code for at least seven years immediately preceding his appointment. Nor does his resume reflect that he is the holder of a certified public accountant certificate from the District of Columbia Board of Accountancy and a member of the Greater Washington Society of Certified Public Accountants with seven years of experience in the practice of public accounting.[7]

The fact that the Council passed the bill on an emergency basis may also raise a court's suspicions about the true intent of the emergency act. Arguably, if the emergency act was not aimed at removing Mr. Maddox, there would be no need to apply the more stringent qualifications as soon as 10 weeks after enactment. In addition, the Council could have made the new qualifications effective for the next term instead of applying them to the incumbent. Further, in the emergency declaration resolution (R15-66) that justifies taking emergency action, the Council criticizes the incumbent's qualifications and conduct, and then states that:

> [t]hese unfortunate incidents can be avoided by ensuring that the Office of the Inspector General meets and adheres to the enumerated qualifications provided for in this bill. Because the public trust and confidence cannot be further compromised, it is essential that an individual not meeting the requirements of the office as enumerated must not

[6] Resolution 14-266 also cites Mr. Maddox's handling of: (1) his legal practice in the District, and of (2) the requirement that he reside in the District, as raising, in the Council's view, "questions about [his] candor, credibility, integrity and ability to perform his duties as Inspector General." Resolution No. 14-366 concludes that it is in the best interest of the District for Mr. Maddox to resign as IG or, alternatively, for the Mayor to investigate whether Mr. Maddox's removal "for cause" is warranted in accordance with the IG Act, D.C. Official Code § 2-302.08(a)(1)(A). A court could take judicial notice of the facts that Mr. Maddox has not resigned and that the Mayor has not attempted to remove him. Therefore, while not necessarily dispositive, a court would likely find these statements by the Council in Resolution No. 14-366 – which was adopted a little more than one year ago, when the Council had the same membership as now – as relevant to the Council's actual purpose under the emergency act, *i.e.* the removal of Mr. Maddox as Inspector General.

[7] Harriet Andrews, Board Liaison to the D.C. Board of Accountancy, Department of Consumer and Regulatory Affairs, told my staff in a telephone conversation that the D.C. Board of Accountancy stopped issuing public accountant certificates in 1999 and that, even when the Board issued such certificates, the certificate holder was not authorized to practice public accounting. It, therefore, appears that it is impossible to qualify for the Inspector General position under this third category.

serve in a hold-over capacity and that a fully qualified individual be selected in a manner that will provide a seamless transition of duties.

Section 2(9) of R15-66. The Council concludes that "emergency legislation is required to enable the Office of the Inspector General to raise its standards without subjecting the District government and citizens to further inadequate service." Section 2(10) of R15-66. If Mr. Maddox is unable to meet the new qualifications by June 1, 2003, then the only way that the emergency act will achieve the stated goal of not subjecting the District government and its citizens to "further inadequate service" is through the removal of Mr. Maddox.

Based on the above, I conclude that the courts would very probably rule that, by applying the new qualification requirements to the incumbent as of June 1, 2003, the Council's legislation violates separation of powers principles. While the Council has the authority to establish the qualifications for the position of Inspector General, it may not use this authority as "a device to unseat the incumbent, thereby encroaching upon the authority of the executive." *Ahearn, supra.* at 34. Accordingly, I conclude that the new subparagraph 208(a)(1)(D-i)(ii) of the IG Act, as added by § 2(d) of the emergency act, should be considered as being null, void, and of no effect, and that Mr. Maddox may lawfully continue to hold the position of Inspector General after June 1, 2003, unless and until there is a contrary court order.

AWT/rfg,wcw